

While working for respondent on April 22, 2012, claimant slipped and fell as he was climbing stairs, carrying a tire. Pursuant to an April 16, 2013, Order from ALJ Nelsonna Potts Barnes, respondent provided treatment for claimant's shoulders. At the preliminary hearing, claimant requested medical treatment for his back and neck. ALJ Klein denied claimant's request for medical treatment for his back and neck, citing the opinions of Dr. Paul S. Stein, the court-appointed physician who evaluated claimant. Dr. Stein indicated claimant aggravated preexisting C5-6 degenerative disk disease and preexisting lumbar spondylolisthesis and there was no documentation that claimant's accident caused a structural change in the body.

Claimant asserts that Dr. Stein also opined claimant's fall at work was the prevailing factor causing his symptomatology. Respondent asks that ALJ Klein's preliminary hearing Order be affirmed.

The sole issue before the Board is whether claimant sustained neck and back injuries by accident arising out of and in the course of his employment with respondent.

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

On April 22, 2012, claimant was carrying a tire with his right arm up some steps, when he slipped and fell, breaking the fall with his left elbow and then rolling over. Claimant had two surgeries on his right shoulder. He testified of having pain in his neck and back. Claimant testified he was working for respondent and had no neck or back issues before the accident.

Dr. Paul S. Stein evaluated claimant on April 18, 2013, by physically examining claimant, taking a history and reviewing claimant's extensive medical records. With regard to claimant's neck and back, Dr. Stein made the following conclusions:

Mr. Smith also has complaints referable to the cervical spine and lumbar spine but indicates that his symptoms have mostly resolved. He manifests limitations of cervical and lumbar range of motion on examination. There is no indication of cervical or lumbar radicular symptomatology and no indication of cervical or lumbar radiculopathy. He *[sic]* is difficult to make a definitive statement regarding the primary or prevailing factor in the neck and lower back as information is limited and a definitive diagnosis has not been made. . . .¹

Dr. Stein recommended cervical and lumbar x-rays with oblique and flexion-extension views and cervical and lumbar MRIs. Those diagnostic studies were completed on June 3, 2013. Dr. Stein, without seeing claimant again, issued a second report on June 7, 2013, in which he gave the following causation opinion concerning claimant's neck and back conditions:

The cervical pathology is preexisting C5-C6 degenerative disk disease. Such degenerative disease takes a significant period of time to develop and was preexisting the work incident. There is no documentation that the incident caused a structural change in the cervical spine. From a medical viewpoint, the work incident more likely than not aggravated the C5-C6 disease and caused it to become symptomatic. However, it is also my opinion that the fall at work was the

¹ P.H. Trans., Cl. Ex 1.

primary or prevailing factor in the current symptomatology. This opinion is based upon the fact that such degenerative disease is often asymptomatic and there is no indication that it would have become symptomatic in the near future without the accident.

The lumbar pathology is preexisting. There is no documentation that the incident caused a structural change in the lumbar spine. From a medical viewpoint, the work incident more likely than not aggravated the spondylolisthesis and caused it to become symptomatic. In this instance, it is also my opinion that the work incident was the primary or prevailing factor in the current symptomatology. Spondylolisthesis is often asymptomatic until an episode of trauma causes aggravation. There is no indication that this would have become symptomatic in the near future without the accident.

From a purely medical viewpoint it is, in my opinion, possible for an accident to be the prevailing factor in the onset of symptoms and need for treatment without causing a measurable structural change in the anatomy. Such an accident, in a situation where preexisting but asymptomatic disease would not predictably have become symptomatic absent the accident, but is aggravated by the accident, may be the prevailing or primary factor. It is my understanding that the 5/15/11 statutory change encompasses all these factors. Which factor takes precedence over the others is a legal and not a medical question.²

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”⁴

K.S.A. 2011 Supp. 44-508 states in part:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

² *Id.*

³ K.S.A. 2011 Supp. 44-501b(c).

⁴ K.S.A. 2011 Supp. 44-508(h).

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

This Board Member affirms the preliminary hearing Order, as claimant's accident triggered his preexisting cervical degenerative disk disease and lumbar spondylolisthesis. K.S.A. 2011 Supp. 44-508(f)(2) provides that an injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic. Dr. Stein's June 7, 2013, report clearly indicates claimant's accident rendered his preexisting neck and back conditions symptomatic.

Dr. Stein's opinion that claimant had no structural change in his anatomy and no new lesion also convinces this Board Member that claimant's neck and back conditions are not a personal injury as defined in K.S.A. 2011 Supp. 44-508(f)(1). Simply put, claimant failed to prove that his accident was the prevailing factor causing his injury and need for medical treatment or that he sustained a change in physical structure or a new lesion.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁶

⁵ K.S.A. 2012 Supp. 44-534a.

⁶ K.S.A. 2012 Supp. 44-555c(k).

WHEREFORE, the undersigned Board Member affirms the August 16, 2013, preliminary hearing Order entered by ALJ Klein.

IT IS SO ORDERED.

Dated this ____ day of October, 2013.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Thomas Klein, Administrative Law Judge